No. 437

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1964

OTTO V. BURNETT,

Petitioner,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 332 F. 2d 529 R. (8-12). The memorandum opinion and order of the District Court is not reported (R. 5-6).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was dated and entered on the 2nd day of June, 1964 (R. 7). The Petition for a Writ of Certiorari was filed on August 28, 1964, and was granted November 16, 1964 (R. 12).

Jurisdiction to review said judgment by Writ of Certiorari is believed to be conferred on the Supreme Court by the provisions of Title 28, U. S. Code, Section 1254 (1).

QUESTION PRESENTED

The question presented is whether the three-year period of limitation applicable to actions for damages under the Federal Employers' Liability Act (45 USC § 56) may be extended by the Ohio Savings Statute (O.R.C. 2305.19).

STATUTES INVOLVED

United States

The first paragraph of Title 45, USC § 56, provides:

> "No actions shall be maintained under this act unless commenced within three years from the day the cause of action accrued."

Ohio

The Ohio Savings Statute is contained in O.R.C. 2305.19.

> "In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff . . . fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of . . . failure has expired, the plaintiff . . . may commence a new action within one year after such date."

STATEMENT OF CASE

Petitioner, a resident of Kentucky, an employee of respondent railroad, was injured on March 17, 1960, in Indiana, while in the course of his employment (R. 2). He commenced an action under the Federal Employers' Liability Act, 45 USC § 51, et seq., in the Common Pleas Court of Hamilton County, Ohio, on March 13, 1963 (R. 2). Upon respondent's motion directed to improper venue, petitioner was non-suited in the Ohio court on June 4, 1963 (R. 2).

On June 12, 1963, petitioner refiled this action in the United States District Court for the Southern District of Ohio, relying upon the Ohio Savings Statute, O.R.C. 2305.19 (R. 1). Respondent filed its Motion to Dismiss, alleging that the Complaint had not been filed in the District Court within the three-year limitation period applicable to FELA actions, 45 USC § 56, and that the Ohio Savings Statute was inapplicable; the District Court sustained said Motion, and ordered the action dismissed (R. 4-6). Upon appeal to the Court of Appeals for the Sixth Circuit, the dismissal was affirmed, the court holding that the limitation period was more than procedural, that it was a matter of substance, that failure to bring the action within the time prescribed extinguished the cause of action and that such time could not be extended by the state saving statute (R. 7-12).

It is the contention of petitioner that there is nothing in the language or history of the Federal Employers' Liability Act to indicate that a claim under the Act expires absolutely, for all purposes and under all circumstances, in three years. To the contrary, petitioner submits that the limitation period thereunder is subject to be tolled by the same valid reasons applicable to any other tort action, including war, fraud, estoppel or state saving stat-

utes, as applied to actions originally commenced within the three-year period.

There is no inherent magic in categorizing the limitation period under the Act as substantive or procedural in nature, so as to justify the federal courts giving effect to the Ohio Savings Statute as to common law causes of action (procedural statutes of limitation), but denying the effect of the same Ohio Savings Statute as to a statutory cause of action (substantive statutes of limitation).

The decision of the Court of Appeals in this cause, as well as those very old decisions of other circuits relied upon by that court, holding that the statutory limitation period created by the Federal Employers' Liability Act is substantive in nature, not subject to being extended for any reason, are in direct conflict with those later decisions of other Courts of Appeals. The best exemplification is the decision of the Fourth Circuit in *Scarborough* v. *Atlantic Coastline R. Co.*, 178 F. 2d 253, cert. denied, in 339 U.S. 919, holding that the FELA limitation period could be extended on account of fraud practiced on the plaintiff, and of the Eighth Circuit, in *Kansas City, Missouri* v. *Federal Pacific Electric Co.*, 310 F. 2d 271 (1962), holding that the statutory limitation period created by the Clayton Act, 15 USCA §15 b, is procedural in nature, subject to being tolled.

While this Court, in *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, established that the limitation period created under the Federal Employers' Liability Act is flexible, and can be tolled by the doctrine of equitable estoppel, the Court has not passed upon the more basic conflict which rages throughout lower courts, both state and federal, i.e., the procedural-substantive dichotomy. It is earnestly submitted that a decision is urgently needed that the congressional intention, in enacting the three-year limitation period under the Federal Employers' Liability

Act in particular, and other federally created rights in general, was simply to set up a uniform statutes of limitation throughout the United States, and that such statutes of limitation are subject to being tolled in the same fashion and for the same reasons as any other statutes of limitation.

In the cases of *Herb* v. *Pitcairn*, in 324 U.S. 117 and 325 U.S. 77, this Court went the greater part of the way in holding that an action under FELA is "commenced," for the purpose of staying the limitation period, when service of process is issued out of the court of original filing, even if that court is unable to proceed to judgment, if the state law permits the transfer to a court which does have jurisdiction to hear and determine the cause without the issuance of new process. The Court specifically reserved its decision as to whether the limitation period would be similarly stayed if state law made new or supplemental process necessary, the exact situation present in the instant cause.

HOW FEDERAL QUESTION IS PRESENTED

The federal question was presented at the outset, the Complaint alleging a cause of action under the Federal Employers' Liability Act, 45 USC § 51, et seq. The decisions of both federal courts were based upon the old, narrow, ritualistic interpretation of the limitation period under said Act, 45 USC § 56.

Petitioner submits that the sole question before this Court is the correct interpretation to be accorded this limitation statute.

ARGUMENT

The decisions of both the Court of Appeals and the District Court in the instant case were based upon the rule that the cause of action under the FELA was created by

statute, that this statute also created the remedy; therefore the limitation period prescribed therein was substantive in nature, and could not be extended.

Petitioner has conceded that prior to 1947, this was the rule.

However, since 1947, courts throughout the United States have reexamined the reasons behind this rule, and have concluded that such holdings were mere semantic distinctions unsupported by reason, and were harsh and unjust. Such courts have in fact largely emasculated the rule by engrafting a growing list of exceptions thereto, based upon various equitable principles.

In the FELA field, we find the decisions of *Osbourne* v. *United States*, 164 F. 2d 767 (1947), CA-2, *Frabutt* v. *New York, C. & St. L. R. Co.*, 84 F. Supp. 460 (W.D. Pa., 1949), *Scarborough* v. *Atlantic Coast Line R. Co.*, 178 F. 2d 253, CA-4, cert. denied 339 U.S. 919, 190 F. 2d 935, 202 F. 2d 84; *Fravel* v. *Pennsylvania R. Co.*, 104 F. Supp. 84 (D. Md.); and *Toran* v. *New York, N. H. & H. R. Co.*, 108 F. Supp. 564 (D. Mass.), where the Courts have held that the limitation period could be tolled because of war, or on account of fraud practiced on the plaintiff.

The rationale opposing the artificial and mechanistic treatment of the earlier cases was best stated in the *Scarborough* case, *supra*:

> "The decisions in the *Osbourne* and *Frabutt* cases show clearly that there is a chink in the supposedly impregnable armor of the substantive time limitation of the Act. If, as those cases decided, there is one exception (war), surely the infinite variety of human experience will disclose others. Those cases demonstrate that a claim under the Act is not a legal child born with a life span of three years, whose life must then expire, absolutely, for all purposes and under all circumstances."

This court recognized the sharp conflict between the pre-1947 and post-1947 cases in *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, and held that the limitation period under the FELA could be extended by the doctrine of equitable estoppel based on fraud.

Every court which has critically reexamined this rule since 1947 has found a basis for extending the particular statutory limitation period. The cases have followed two broad avenues to reach the same result.

In the cases which have considered the FELA limitation period, the courts have discussed the procedural-substantive dichotomy, but none has made the flat assertion that the limitation statute, 45 USC § 56, was solely procedural in nature. Rather, in each case the exception was based upon equitable considerations which these courts held were so basic as to be applicable to both procedural and substantive limitation statutes.

In contrast to this form of analysis of the FELA limitation, the federal courts, of late, in interpreting the parallel limitation statute under the Clayton Act, 15 USC § 15 b, have flatly asserted that it is procedural in nature, and therefore subject to being extended. As stated in *Kansas City, Missouri* v. *Federal Pacific Electric Co.*, 310 F. 2d 271 (CA-8, 1962):

> "While we believe that the controlling factor in determining whether the statute should be tolled for fraudulent concealment is congressional intent, irrespective of the doubtful procedural-substantive dichotomy, if such a classification is significant, it is our view that the evidence supports plaintiff's contention that § 4 b is procedural."

In like vein are the cases of *Public Service Co. of New Mexico* v. *General Electric Co.*, 315 F. 2d 306 (CA-10, 1963) and *Westinghouse Electric Corp.* v. *Pacific Gas & Electric Co.*, 326 F. 2d 575 (CA-9 1964).

Petitioner recognizes that all of the post-1947 era cases cited above, as examples of the revolution which has taken place in extending the hitherto restrictive limitations under statutory causes of action, have involved fact situations in which plaintiff found himself in the predicament of being unable to commence his action within the statutory period because of circumstances beyond his own control, the most frequent example being fraudulent concealment. In such extreme circumstances, the courts have felt it necessary to utilize equitable principles to avoid the harsh result inherent in a too-literal interpretation of the particular limitation statute.

The Court of Appeals, in the instant case, noting this thread running through these cases, sought to distinguish petitioner's plight on the ground that he had placed himself in his predicament by his own act in choosing the wrong forum in which to initiate his suit; that such a circumstance did not call forth the same need for equitable intervention by the court as did facts based on fraud.

The fundamental error in this analysis is that the Court overlooked the fact that savings statutes of the type involved in this action were originally enacted in the various states, and thereafter applied as part of the procedural law by the federal courts, in order to satisfy the same basic need for equitable intervention as existed in the case of fraud.

This Court has recognized the common equitable background of the two situations. In discussing the legislative history of the removal statute, 28 USC § 1406 (a), which prevents, as between federal courts, the same injustice as savings statutes do between state courts, this Court, in *Goldlawr* v. *Heiman*, 369 U.S. 463 (1962), held:

> "The problem which gave rise to the enactment of the section was that of avoiding the injustice which had often resulted to plaintiffs from dismissal of their

actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn.

"When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure. If by reason of the uncertainties of proper venue a mistake is made, congress, by the enactment of § 1406 (a), recognized that 'the interest of justice' may require that the complaint not be dismissed but rather that it be transferred in order that the plaintiff not be penalized by what the late Judge Parker aptly characterized as 'time-consuming and justice-defeating technicalities'."

Justice Cardozo, while on the New York bench, made similar observations regarding the savings statutes in *Gaines* v. *City of New York* (1915), 215 N.Y. 533, 109 N. E. 594 at page 596.

This Court, in the twin decisions in *Herb* v. *Pitcairn*, 324 U.S. 117 and 325 U.S. 77, swept past the procedural-substantive dichotomy, and had no difficulty recognizing the need for such an exception to the limitation period of the FELA, indeed, both Justices Black and Rutledge commented on the need for such an exception in their dissents, on other grounds, to the opinion in 324 U.S. 117, at pp. 131, 132, 133 and 137.

As stated by Mr. Justice Black, at p. 133:

"The plainest principles of justice demand that these employees be afforded a trial. No reason that can be conceived for erecting a statutory bar of two years justifies an inference that Congress intended that employees who made bona fide efforts to prosecute their claims in a court should be barred because of unan-

> ticipated decisions as to jurisdiction. The words of the statute justify the construction that these actions were 'commenced' when they were filed in the City Courts. Any other construction results in a frustration of the broad objectives of the act."
>
> "If for instance it should be the state law that local causes are sufficiently commenced from the time of filing the complaint, though in the wrong court for reasons of jurisdiction relating to trial and decision, if nevertheless upon discovery of the error the cause is transferred to another court having complete jurisdiction, nothing in § 6 or the Federal Employers' Liability Act requires or permits suits brought under that Act to be treated differently."

It is petitioner's contention that it is logically unsound to permit, as did the Court of Appeals, the FELA limitation statute, 45 USC § 56, to be tolled by reason of war, fraud, fraudulent concealment or estoppel, but to balk at recognition of the next logical and necessary step, to wit: that these same equitable principles demand that such limitation period also be tolled by a saving statute, in a case where the action was first commenced within the statutory period, but where the plaintiff had stumbled into a venue pitfall, necessitating a transfer to a fully competent court.

This Court's decision in *Glus* v. *Brooklyn Eastern District Terminal,* 359 U.S. 231, might have been more fortunate if it had cut through the profitless semantics of the procedural-substantive debate entirely, as did the Federal cases cited above, or, failing that, at least have clearly stated beyond doubt or quibble, that the limitation statute involved was procedural in nature, and subject to being tolled by the same equitable factors as any other remedial statute. The failure to do so has resulted in the lower federal and state courts being left to their own devices in interpreting the extent of the applicability of the *Glus* case.

On the one hand we find the Court of Appeals of Tennessee, in *Breneman* v. *C. N. O. & T. P. Ry. Co.*, 346 S.W. 2d 273 (1961), in a fact situation closely analogous to the instant case, holding that the FELA limitation period was tolled by the Tennessee Saving Statute, T.C.A. § 28-106, which is comparable to Ohio Revised Code § 2305.19, and basing their decision on the proposition:

> "Although there is a conflict in the Federal cases, we think *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 has effected a change in the rule of earlier cases."

and concluding:

> "We are not unmindful that the saving statute, T.C.A. § 28-106 applies only to a statute of limitations which relates to the remedy. *Automobile Sales Co.* v. *Johnson*, 174 Tenn. 38, 122 S.W. 2d 453, 120 ALR 370. As we have seen, however, under the Federal law the distinction has been abolished and is no longer recognized with respect to actions under the Federal Employers' Liability Act. The limitation being procedural only a new action may be instituted within one year after a voluntary dismissal."

We also find the Ninth Circuit, in *Westinghouse Electric Corp.* v. *Pacific Gas & Electric Co.*, 326 F. 2d 575 (1964), holding:

> "Many of the cases supporting appellant's contention do so by way of dicta. See *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. p. 234, 79 S. Ct. p. 762, 3 L. Ed. 2d 770. We believe, where circumstances dictate, the trend is toward applying the fraudulent concealment exception to all statutes of limitation, be they limitations on the right itself or merely on the remedy."

At the same time, we find the Court of Appeals, in the instant case, stating:

> "We find nothing in *Glus* indicating that the Supreme Court has overruled previous cases holding that the Limitation in the Act was substantive and not procedural. In our judgment, cases involving fraud are inopposite. We prefer to follow the decisions in *Bell, Gibson Lumber Co.* and *Cotton, supra,* which are precisely in point.
>
> "We are not prepared to extend the rule in *Glus* to the facts of the present case."

Additionally, the instant cause goes that one step further than the situation presented in *Herb* v. *Pitcairn,* 325 U.S. 77, in that the Ohio Savings Statute, O.R.C. 2305.19, made new process necessary in the transfer of the cause to the United States District Court. The issue is squarely put to the Court to resolve the one question left unanswered in *Herb* v. *Pitcairn,* 325 U.S. 77 at p. 79,

> "whether the action would be barred if state law made new or supplemental process necessary . . . ."

Petitioner submits that a logical extension of the rules announced in *Herb* v. *Pitcairn,* 325 U.S. 77 and *Glus* v. *Brooklyn Eastern District Terminal,* 359 U.S. 231 requires a negative answer to that question, and a decision by this Court that statutes of limitation, be they limitations on the right itself or merely on the remedy, are subject to the very same exceptions, and specifically, that the federal Employers' Liability Act limitation period can be tolled by an appropriate state savings statute. Such a decision would not only be in accord with the reasoning of prior decisions of this Court, but would remove the distressing uncertainties and conflicts into which lower courts presently have fallen.

CONCLUSION

Petitioner submits that the limitation statute under the Federal Employers' Liability Act, 45 USC § 56, has never been interpreted by this Court as being substantive in nature, not subject to extension by an applicable state saving statute. On the contrary, the logical extension of the rules of *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 and *Herb* v. *Pitcairn*, 325 U.S. 77, allows no other conclusion but that such statute may be so tolled.

Because the United States Court of Appeals for the Sixth Circuit erroneously considered that it was not bound to follow such rules, its decision should be reversed, and the cause remanded for trial on the merits.

Respectfully submitted,

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